Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area	))))))	WC Docket No. 05-281

INITIAL COMMENTS OF COVAD COMMUNICATIONS GROUP, INC.

Brad E. Mutschelknaus
Thomas W. Cohen
Jason Karp
Stephanie A. Joyce
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)

Counsel to Covad Communications Group, Inc.

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Covad Communications Group, Inc., through its undersigned attorneys, submit these comments in the above referenced docket. On October 6, 2005, ACS of Anchorage, Inc. ("ACS") filed an Amended Petition ("Petition") with the Federal Communications Commission (the "Commission") seeking forbearance from, among other things, its unbundling obligations under Section 251(c)(3) of the Communications Act of 1934,[1] as amended (the "Act"), throughout the Anchorage study area. For the reasons set forth herein, ACS's Petition should be denied.

I. INTRODUCTION AND SUMMARY

Forbearance from Section 251(c)(3) obligations is governed by Section 10 of the Act, which permits the Commission to forbear from enforcing certain sections of the Act, including any and all implementing regulations, provided the following four criteria are met: (1) enforcement of the provision(s) is not necessary to ensure the charges, practices, classifications, or regulations in connection with the

[1] 47 U.S.C. § 251(c)(3).

telecommunications provider or its services are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement of the provision(s) is not necessary for the protection of consumers; (3) forbearance is in the public interest; and (4) the requirements of Section 251(c) and 271 have been fully implemented.

Under no interpretation of Section 10 does ACS's Petition pass muster. As discussed more fully below, the Petition is devoid of the relevant facts necessary for any reasonable determination of forbearance under Section 10. Thus, the Petition fails on at least four separate grounds.

First, the Petition fails to provide sufficiently detailed information regarding competition in each of the relevant geographic and product markets required to sustain a forbearance determination. Specifically, the Petition fails to: (1) address in a meaningful way market competition in any of the relevant product markets previously identified by the Commission,[2] save only generalized claims regarding

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[2] The Commission, in the *Qwest Omaha Order*, identified three relevant product markets when considering forbearance from dominant carrier regulation: (1) mass market – voice services; (2) mass market – broadband services; and (3) enterprise services. *Id.* at ¶ 22 [fix cite]. It is not clear whether the Commission actually employed these product market definitions as part of its Section 251(c) analysis. In addition, the Commission explicitly identified in the *Triennial Review Order* the relevant product markets for purposes of Section 251(c) to include the mass market, the small/mid-size enterprise market, and the large enterprise market, noting that these "customer classes generally differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenues they generate, and the costs of delivering them services of the desired quality." *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, at ¶ 123 (2003) ("*Triennial Review Order*" or "TRO"), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA*

mass market voice services; and (2) provide sufficient geographic market information to reasonably make a forbearance determination.[3]

Second, despite the Commission's recognition of the relevance of such information to a forbearance determination, ACS fails to provide any detailed information regarding the amount of local exchange market share actually captured by competing carriers in *each* of the relevant product *and* geographic markets ("Market Share"), or provide factual support demonstrating that competing carriers are willing and able to provide, within a commercially reasonable period of time, services in *each* relevant product *and* geographic market ("Coverage Share"). The Petition is limited only to largely unsupported generalized claims regarding Market Share and Coverage Share in the mass market for voice services, and then only with respect to a single carrier, General Communication Inc. ("GCI").

Third, ACS fails to provide any credible evidence that the only facilities-based competitor it has identified – GCI – does not and will not continue to reasonably rely on unbundled network elements ("UNEs") – namely UNE loops – to provide local exchange services within the Anchorage study area. Indeed, the Petition indicates otherwise, demonstrating that GCI currently serves only approximately 18 percent of all access lines through exclusive use of its own

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II"), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). In any event, the ACS Petition fails to provide sufficient detailed evidence to make any market-specific forbearance determination.

3 *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533 at ¶ 43 (2005) ("*Triennial Review Remand Order*" or "*TRRO*").

facilities or multiplexed ACS loops.[4] The availability of UNEs thus clearly remains an essential and effective measure in ensuring the necessary growth in the still nascent Anchorage market.

Fourth, ACS fails to provide any factual evidence of the existence of intermodal competition in *each* of the relevant product *and* geographic markets, or that there in fact exist any providers of Voice over Internet Protocol ("VoIP") services in Anchorage, regardless of whether they are providing competitive alternatives to ACS's local services. The Petition relies only on generalized claims of industry analysts, not specific to Anchorage.

Finally, ACS fails to demonstrate: (1) that there are any facilities-based competitors operating in any of the relevant product or geographic markets other than GCI; (2) that GCI, or any other carrier, will make any or all of its network available to third party carriers; (3) that ACS, if its Petition is granted, will have any incentive to offer its network to third-party carriers at rates able to sustain competitive entry; or (4) that barriers to entry have been effectively eliminated so as to permit new facilities-based and non-facilities based carriers to economically enter, and operate within, the Anchorage market.

The Commission most recently interpreted the Section 10 forbearance criteria as applied to Section 251(c) in the *Qwest Omaha Order*.[5] As discussed more

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4 *See* Petition at 12 (ACS represents that there exist approximately 182,000 total access lines in Anchorage, of which GCI only serves 32,000 over its own facilities or through multiplexed ACS loops.).

5 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and

fully below, however, notwithstanding the above analysis, which holds true irrespective of the forbearance standard applied, the Commission should not be bound by the Section 10 forbearance analysis and conclusions in the *Qwest Omaha Order* in the instant case because the *Qwest Omaha Order* was limited explicitly to the facts presented in that case.

For these reasons, and pursuant to the additional analysis provided below, ACS's Petition for forbearance is clearly premature and should be denied.

II. THE ACS PETITION SHOULD BE SUMMARILY DISMISSED.

A. The Unbundling Rules Established by the *Triennial Review Remand Order* are Not Yet "Fully Implemented" as Required by Section 10(d).

Before the Commission can consider a request for forbearance from the unbundling requirements of Section 251(c)(3), pursuant to Section 10 of the Act, *all* requirements of Section 251(c)(3) *must* be *fully implemented*.[6] Section 10(d) reads in pertinent part:

> [T]he Commission *may not* forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been *fully implemented*.[7]

ACS's Petition is thus clearly premature. First, as the Commission is aware, the unbundling rules promulgated by the Commission in the *Triennial Review Remand Order* are not yet in full effect. Although the Commission concluded in the *Triennial Review Remand Order* that competitive carriers are not impaired without

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Order, FCC 05-170 (rel. Dec. 2, 2005) ("*Qwest Omaha Order*") [fix cite – given fn. 2, can be short].

6 *See* 47 U.S.C. § 160(d) (emphasis added).

7 *Id.* (emphasis added).

access to certain Section 251(c)(3) UNEs, a minimum transition period of no less than 12 months applies for *all* such de-listed UNEs. In certain instances, the transition period extends for 18 months from the effective date of the *Triennial Review Remand Order*.[8] In that regard, the Commission's unbundling rules will not be fully implemented with respect to de-listed Section 251(c)(3) UNEs, until the close of the latest relevant transition period, currently scheduled for September 11, 2006. Only then will the incumbent local exchange carrier ("ILEC") unbundling obligations with respect to de-listed UNEs terminate. Second, in the *Triennial Review Remand Order*, the Commission revised its criteria for determining impairment, and as such, ILECs must continue to provide certain UNEs until the Commission determines that competitive carriers will not be impaired without them. Thus, with respect to UNEs not de-listed, Section 251(c)(3) is not "fully implemented," and thus forbearance cannot be granted, until the Commission makes a determination of non-impairment for all remaining UNEs consistent with its rules.

In the *Triennial Review Remand Order*, the Commission emphasized that regulatory certainty is essential to the development of local competition, and protecting the interests of customers.[9] Still, competitive carriers must be able to rely on the availability of existing UNEs and the revised impairment criteria in formulating their business plans and market entry strategies. Any forbearance

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8 *See e.g. Triennial Review Remand Order* at ¶ 144 (the Commission adopted a transition period of eighteen months for dark fiber transport facilities.).

9 *See e.g., id.* at ¶¶ 142-145, 195-198, 226, 228.

ruling by the Commission that alters the existing unbundling framework, as set forth in the *Triennial Review Remand Order*, not only would violate Section 10(d), but more fundamentally would severely undermine the steps recently undertaken by competitive carriers to transition off of recently de-listed UNEs, and modify their market entry strategies based on UNE availability, potentially resulting in harm both to competitive carriers and their customers.

ACS, through its Petition, however has requested the Commission to do just that – that is, forbear from enforcing *all* of the requirements of Section 251(c)(3) despite the fact that those requirements have not been fully implemented. Indeed, ACS's forbearance request extends not only to those UNEs that have been de-listed and are subject to the currently running transition periods established in the *Triennial Review Remand Order*, but also to UNEs that the Commission recently determined *are* necessary to ensure a competitive market, and without which competitive carriers would be impaired – namely mass market loops, and high capacity loops and transport for enterprise customers.[10] This request, however, is at odds with the very standard ACS claims applies to the analysis. Specifically, ACS argues that Section 251(c)(3) should be deemed fully implemented if "the pro-competitive goals of the unbundling requirements are fulfilled and if competitors no longer would be impaired in the absence of UNEs."[11] However, ACS then

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10 *See* Petition at 1. ACS requests generally that the Commission forbear from applying Section 251(c)(3) and related Section 252(d)(1) pricing standards within the Anchorage study area, and does not in any way limit its request to specific UNEs, without which the Commission has determined competitive carriers are non-impaired.

11 Petition at 24.

contradicts itself by arguing that whatever the test for "fully implemented" includes, it should not include the threshold requirements for non-impairment already established by the Commission.[12] Thus, on the one hand ACS argues that Section 251(c)(3) is fully implemented if competitors are no longer impaired, and on the other, it argues that the Commission cannot apply its own established test for impairment to determine if Section 251(c)(3) is fully implemented. This is clearly an untenable position. ACS understands that an impairment test is necessary to determine whether Section 251(c)(3) is fully implemented, but is asking the Commission to change the established impairment standard to one that is more relaxed and more likely to result in the relief it is requesting. This request is inappropriate and should be rejected.

The Commission has already established the impairment criteria for de-listed UNEs and applied such a market analysis in its prior decisions to eliminate certain UNEs. For example, in early 1998, the Commission received requests from six Bell Operating Companies ("BOCs") for forbearance from xDSL-related UNE provisioning. The Commission rejected those requests on the ground that it does "not have the statutory authority to forbear from either section [251 or 271] prior to it full implementation."[13] Reasoning that "sections 251(c) and 271 . . . are the cornerstones of the framework Congress established in the 1996 Act," the

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12 *Id.* at 25.

13 *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, 24020, at ¶ 18 (1998) ("*Advanced Services Order*").

Commission refused to forbear from any unbundling until the evidence demonstrated that competition had taken hold.[14] Nowhere in the *Advanced Services Order* did the Commission attempt to equate "fully implemented" with "rulemaking activities," and rightly so. The Commission understood that forbearance is permissible only where the market realizes a level of competition sufficient to protect the public from monopolistic practices. The Commission was at that time steadfast that forbearance was premature until meaningful, irreversible competition had taken hold.

Ultimately then, a determination of whether Section 251(c)(3) is fully implemented should not rely simply on whether a rule has been promulgated, but rather that compliance with that rule has been actually effected. In applying this standard in the *OI&M Order*, the Commission concluded that Section 272 was not deemed "fully implemented" under Section 10(d) until *all* time frames established for the implementation of the Section 272 requirements had concluded.[15] Specifically, the BOCs were required to maintain separate affiliates for three years after each BOC had obtained Section 271 authority to provide in-region interLATA services, and no forbearance could be granted until such three year time periods expired. Similarly, in the *Section 271 Forbearance Order*, the Commission determined that Section 271 was fully implemented only after the BOCs complied

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14 *Id.*

15 *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commissions Rules*, Memorandum Opinion and Order, 18 FCC Rcd 23525 at ¶ 7 (2003) ("*OI&M Order*").

with *all* of the Section 271 checklist items and were granted authority to provide in-region interLATA services.[16] Conversely, notwithstanding the fact that the Commission rules relating to Section 271 were established, as long as any of the checklist items remained pending, Section 271 could not be deemed "fully implemented."[17]

In the instant case, the Commission has promulgated extensive rules under the *Triennial Review Remand Order*, establishing a framework for determining when UNEs are no longer necessary under Section 251(c)(3), and identifying transition timeframes for de-listed UNEs, recognizing in its analysis the need to protect competitors and their customers. At a minimum, then, until the Commission transition time frames for de-listed UNEs expire, the Commission is not authorized under Section 10 to provide forbearance relief from the requirements of Section 251(c)(3). Thus, in the context of Section 251(c)(3), all pending transition time periods for de-listed UNEs must sunset before the Section 251(c)(3) requirements with respect to those elements are deemed "fully implemented."

Forbearance from the requirement to provide mass market loops and high capacity loops and dedicated transport, however, requires more than simply the expiration of time. Prior Commission orders demonstrate that before Section 251(c)(3) can be deemed fully implemented, affected market participants must have

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16 *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. §160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. §160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. §160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 at.¶ 15 (2004) ("*Section 271 Forbearance Order*").

complied with the requirements established by the statute and the Commission, namely the provision of UNEs at cost-based rates until competitive carriers would no longer be impaired without them. In this regard, until the Commission has made such an impairment determination, there can be no finding that Section 251(c)(3) has been fully implemented with respect to mass market loops and high capacity loops and dedicated transport, and no forbearance determination can be made. Permitting forbearance in such instance would essentially have the effect of prematurely terminating the Commission rules and the statutory requirements before they had the opportunity to fully take effect, which was not the intent of Section 10(d).

Notwithstanding these prior rulings, in the *Qwest Omaha Order*, the Commission determined that the requirements of Section 251(c) were in fact "fully implemented," thus clearing the way for the Commission to undertake a substantive forbearance analysis.[18] That determination, however, should not be controlling here because it, by the Commission's own acknowledgment, was limited to its particular facts.

B. The ACS Petition Fails to Analyze the Relevant Markets and thus Lacks the Necessary Information for a Forbearance Determination.

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17 *Id.*

18 *Qwest Omaha Order* at ¶ 58. In the *Qwest Omaha Order*, recognizing that the unbundling rules will remain in a certain state of flux with ongoing court challenges, the Commission concluded that to determine Section 251(c) is not fully implemented until there exists "permanent" rules that have survived every court challenge would transform the "fully implemented" clause into an absolute bar to any forbearance determination. *Id.* at ¶ 56.

As the Commission is aware, Section 10 of the Act essentially establishes a three-pronged test for determining whether forbearance from regulation is appropriate. Specifically, Section 10 states in pertinent part:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic market, if the Commission determines that—
>
> 1. enforcement of such regulation or provision is not necessary to ensure that the charges, practice, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> 2. enforcement of such regulation or provision is not necessary for the protection of consumers; and
> 3. forbearance from applying such provision or regulation is consistent with the public interest.[19]
>
> In undertaking the public interest analysis, the Commission must also consider whether "forbearance from enforcing the provision or regulation will promote competitive market conditions."[20] A Section 10 forbearance analysis thus requires the Commission to consider: (1) the relevant product or service or group of products or services – otherwise referred to as a product market; and (2) the relevant geographic market; and then whether forbearance from enforcing the relevant regulations, in this case Section 251(c)(3), will satisfy the three-pronged test required by the statute.

With regard to the relevant product market, the Commission in *Qwest Omaha Order* identified three distinct product markets as a basis for its analysis in

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19 *See* 47 U.S.C. § 160.

20 *Id.*

connection with forbearance from dominant carrier regulation: (1) the enterprise market; (2) the mass market - switched access services; and (3) the mass market - broadband Internet access services.[21] It appears that the Commission was using similar product market definitions with respect to forbearance from Section 251(c) obligations, although, other than making reference to the wholesale market in its Section 251 discussion, it never addressed product market definitions explicitly, or the applicability of such definitions to Section 251(c), in the forbearance context. It is clear, however, that the Commission, in the *Qwest Omaha Order*, explicitly rejected Qwest's proposed relevant product market as the market for all services provided under Section 251(c), correctly noting that such a definition was unworkable as too broad, especially in light of the differing needs of mass market and enterprise market customers.[22]

As such, for purposes of the analysis in these comments, we will apply the Commission's three-tiered product market definitions of mass market (switched access), mass market (broadband), and enterprise, as well as the Commission's discussion of competitive wholesale alternatives. Even on the face of the ACS Petition, however, there is no evidence presented that competition exists within each product market relevant to the Commission's forbearance analysis.

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21 *See Qwest Omaha Order* at ¶ 22. We also note that the Commission in, the *Triennial Review Order*, recognized three distinct product markets in undertaking its Section 251(c) analysis: (1) the mass market; (2) the small/medium enterprise market; and (3) the large enterprise market. *See Triennial Review Order* at ¶ 123.

22 *Id.* at ¶ 21. [fix cite?]

First, it is important to acknowledge that ACS, as the petitioning party, bears the burden of demonstrating that it is entitled to forbearance. In this regard, it is incumbent on ACS to ensure that its Petition, including all exhibits thereto, are complete and provide ample factual information for the Commission to reasonably make a forbearance determination. Unfortunately, ACS's Petition falls short of this requirement, incorporating little relevant and specific factual information about the state of competition in the Anchorage study area generally, and more importantly, providing no information at all on a product market-specific basis. Rather, similar to the proposal of Qwest to lump all Section 251(c) services into a single product market, the ACS Petition focuses solely on one market –the retail local exchange mass market – as measured solely in terms of retail access lines -- by a single competing carrier, GCI, in the Anchorage study area. ASC has not even attempted to identify any other relevant market, let alone demonstrate that each such market is sufficiently competitive to justify forbearance. Quite to the contrary, ACS claims that any distinction between residential and enterprise markets is irrelevant due to the relatively small size of the Anchorage market.[23] ACS provides no support for such an assertion, and the Commission should reject such an approach.[24] Moreover, ACS fails to provide any information regarding competitive supply of wholesale services, or to justify its claims that it will remain inclined to offer its services on a

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23 Petition at 12.

24 We note that ACS's failure to acknowledge relevant differences in residential and enterprise markets is particularly troubling in light of the fact that ACS's sole facilities-based competitor – GCI – is also the monopoly cable provider, whose cable facilities traditionally were not deployed to serve the enterprise market to near the same extent as to serve residential customers.

wholesale basis, at reasonable rates. ACS further fails to make any distinctions among small/medium and large enterprise customers, or among mass market voice and broadband services. These are fatal flaws in ACS's submission to the Commission.

Product markets are not defined by size or geography or statute. They are defined by customers, and what those customers purchase. A relevant product market is defined by an area of commerce which, if controlled by a monopolist, would be subject to pricing abuse. The Department of Justice Merger Guidelines set forth the appropriate test for defining relevant markets as follows:

> [T]he Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product.[25]

This analytical process is continued until "a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a 'small but significant nontransitory' increase . . ." Significantly, the relevant market is "the smallest group of products that satisfies this test."[26] The size of the

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25 Horizontal Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission, issued Apr. 2, 1992, revised Apr. 8, 1997 at § 1.11.

26 *Id.*

overall geographic market is irrelevant to the product market inquiry. What is relevant, however, is the differing needs of customers purchasing telecommunications services. The fact that one market happens to be smaller than another does not alter the fact that a 5,000 employee multi-location business has very different telecommunications needs than a five employee copy shop, or a residential home with three teenage children. The Commission has recognized time and time again that a true analysis of market competition must be predicated on review of the appropriate product markets; and that such product markets are not defined by relative size, but rather the services bought and sold by consumers.[27]

Not only does ACS largely ignore the enterprise market in its Petition, it similarly fails to mention any competitive alternatives in the wholesale market, or even make any distinction between mass market local access services and mass market broadband services, as was required by the Commission in the *Qwest Omaha Order* in connection with its review of certain dominant carrier regulation.[28] ACS purports to provide statistics and anecdotal evidence that the Anchorage market is fully competitive, but never provides factual data regarding the relative market shares or service offerings of the existing broadband providers, providers of service to enterprise customers, or the relative availability of wholesale inputs and services in Anchorage.[29] Indeed, the Commission in the *Qwest Omaha Order*

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27 *See, e.g., Triennial Review Order* at ¶¶ 123-34, 127-29.

28 *Qwest Omaha Order* at ¶¶ 22, 67-68.

29 *See id.* at ¶ 66 (recognizing the significant inroads Cox had made in both the mass market and higher revenue enterprise market, contributing to its conclusion to grant forbearance in both markets), and ¶ 68 (recognizing that several carriers have had success competing for enterprise services).

predicated its decision in large part on the demonstrated existence of several competitors for enterprise customers and the continued availability and widespread use of Qwest's wholesale facilities and services – two critical offers of proof that simply do not exist in the current Petition.[30] Rather, ACS's almost exclusive focus is on mass market local exchange services. Without a full factual analysis of each of the relevant product markets in Anchorage, the Commission cannot make any sustainable finding with respect to forbearance from the requirements of Section 251(c)(3).

Similarly, ACS fails to acknowledge the Commission's determination of wire centers as the relevant geographic market for determining the level of market competition in a Section 251(c)(3) forbearance analysis. Rather, ACS again makes sweeping assertions without factual justification, claiming that the appropriate geographic market is the entire Anchorage study area.[31] Such a position, based on the current Petition, is simply unsustainable. In the *Triennial Review Remand Order*, the Commission determined that the proper geographic market for analyzing market competition is the LEC wire center.[32] Similarly, in the *Qwest Omaha Order*, while addressing the entire Omaha MSA where Qwest provided services, the

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30 *Id.* at ¶¶ 67-68. While ACS argues that it will continue to provide resale services under Section 251 and that it maintains an incentive to continue to negotiate with GCI for access to the ACS network, what little information ACS provides demonstrates that, other than the lines owned or controlled by ACS and GCI, there are no other facilities-based competitors in Anchorage and that all remaining competitors combined serve no more than approximately 5,000 lines through total service resale. *See* Petition at 12, 17.

31 *See* Petition at 26.

32 *Triennial Review Remand Order* at ¶¶ 155-56.

Commission engaged in a wire center specific analysis,[33] expressly rejecting an MSA-wide analysis.[34] In contrast, ACS has simply claimed that the Anchorage study area is "too small" for such requirements to apply.[35] It has not provided a scintilla of factual evidence regarding the geographic distribution of customers or purchasing patterns to justify a departure from the prior Commission finding. If ACS believes the wire center is not the appropriate geographic area for purposes of analyzing competition in Anchorage, it must conduct an analysis as set forth in the Horizontal Merger Guidelines. The Commission cannot base its decision to forbear from UNE regulation in Anchorage solely on ACS's claim that Anchorage is "too small," or that the entire Anchorage area is "equally" competitive, without having before it any factual justification for such claim.[36]

Indeed, ACS has chosen to rely on mere assertions and speculation in identifying its proposed relevant product and geographic markets to be used in connection with the Commission's forbearance analysis. The Commission, and all parties to this proceeding, however, are entitled to supportable evidence and facts – something ACS has not provided. Accordingly, the ACS Petition, on its face, lacks the information necessary for the Commission to determine that Section 251(c)(3) forbearance relief is appropriate for any of the geographic or product markets in the Anchorage study area, and as such the petition should be summarily dismissed.

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33 *See e.g. Qwest Omaha Order* at ¶¶ 62, 66, 69 and n. 186.

34 *Id.* at n. 186.

35 Petition at 24-25, 28.

36 Petition at 27.

C. The ACS Petition Lacks Evidence of Retail Market Share and Coverage Share in the Markets Defined by the Commission.

In the *Qwest Omaha Order*, the Commission concluded that "Retail Market Share" and "Coverage Share" both are relevant to a determination that Section 251(c)(3) forbearance relief is appropriate. The "Retail Market Share" test employed in the *Qwest Omaha Order* refers to the number of local end users served by a competing carrier, or otherwise the percentage of the retail local exchange market captured by a competing carrier in each relevant product and geographic market.[37] The "Coverage Share" test employed in the *Qwest Omaha Order* refers to whether a competing carrier "is willing and able within a commercially reasonable time" to provide service in each relevant product market to customers served by a specific wire center within the footprint of the ILEC.[38]

The ACS Petition does not apply the "Retail Market Share" and the "Coverage Share" tests to each market defined by the Commission. Rather, ACS focuses solely on the retail local exchange market share captured by a single competitor, GCI, in the entire Anchorage market, without reference to wire centers or product markets, and only in terms of retail access lines currently served by GCI. ACS casually claims, without any factual support, that there should be no distinction between residential and enterprise markets.[39] Consistent with this approach, it provides no factual or statistical data about any carriers serving the enterprise market. The residential broadband market is equally ignored, as is any

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37 *Qwest Omaha Order* at ¶ 66.

38 *Id.* at ¶¶ 62, 69.

discussion of competitive alternatives in the wholesale market. Indeed, ACS's only focus is on GCI. Similarly, ACS fails to provide any specific data about where GCI (as it does not materially discuss any other carrier) is willing and able to provide services and on what time frame. All ACS claims is that GCI reports that it plans to convert all existing customers to its own facilities within the next two years.[40] There is no data as to which markets or wire centers are affected, or on what time frames. Both Retail Market Share and Coverage Share determinations were critical to the Commission's analysis in the *Qwest Omaha Order*, and they are relevant criteria for any competitive market analysis. Yet these critical inputs to the analysis are lacking in the ACS Petition. Finally, there is no discussion of whether GCI's network or services are available, or will be available, for purchase by third-party carriers on a wholesale basis, another critical input in the forbearance analysis. Accordingly, the ACS Petition, on its face, lacks the information necessary for the Commission to determine that Section 251(c)(3) forbearance is appropriate for the Anchorage study area, or any part thereof.

D. GCI Substantially Relies on UNE Loops to Provide Local Exchange Service in Anchorage.

In the *Qwest Omaha Order*, the Commission unequivocally concluded that Section 251(c)(3) forbearance relief is not appropriate where competing carriers continue to rely on UNE loops to provide telecommunications service. Specifically, the Commission stated that "forbearing from section 251(c)(3) and other market-

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39 Petition at 12.

40 *Id.* at 14.

opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing 'last-mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers…."[41] Further, the Commission suggested that construction of last-mile facilities (*i.e.,* local loops) by a competing carrier is critical to granting Section 251(c)(3) forbearance relief.[42]

The ACS Petition clearly indicates the GCI relies heavily on UNE loops to serve its mass market customers within the Anchorage study area (the Petition does not discuss the enterprise market). For example, the Petition notes that GCI currently serves only 18 percent of all access lines over its own facilities or through multiplexing of ACS loops, and forecasts that GCI will serve only 30 percent of its end user customers over its own facilities by the end of 2005. This would thus leave 70 percent of all GCI local customers on their current service delivery method – either UNE loops or resale.[43] Put another way, 82 percent of all customers in Anchorage are currently either served via resale, UNE loops or ACS's facilities. While GCI may have a transition plan for the remaining lines it currently serves, the fact that it currently relies on UNEs as a significant source of its network deployment should be dispositive in finding that forbearance in this case is premature.

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41 *Qwest Omaha Order* at ¶ 60.

42 *Id.* at ¶ 78.

43 ACS's 30 percent forecast represents something less than 18 percent of *all* access lines in Anchorage, as that number only considers those access lines running exclusively on GCI's network, not multiplexed ACS loops, which is included in the 18 percent calculation.

ACS's claims that GCI's network is ubiquitous and available for GCI to transition its UNE customers at any time are not supported by record evidence. While GCI's transition plans are clearly relevant to any competitive inquiry, GCI's continued reliance on UNEs to serve its customers undercuts any notion that it would not be impaired if the requested relief is granted. The record indicates that GCI has been steadily migrating customers to its own facilities as quickly as market economics permit. GCI certainly does not require additional incentive, as ACS alleges, to pick up the pace, especially if doing so could put its ability to economically serve such customers in jeopardy. As the Commission is keenly aware, the mere existence of traditional downstream cable television facilities does not equate to a ubiquitously available local exchange network onto which customers can be migrated at the flip of a switch. It is a big step from having coaxial video ready cable deployed to offering full duplex, feature-rich local exchange telecommunications services. Switches must be programmed, lines conditioned, inside wiring updated, outside plant upgraded, operator and directory assistance functionality made available, E911 systems made ready and accessible, billing and back office systems made ready, and the signaling network implemented, etc. Indeed, there are likely many more operational issues associated with preparing cable plant to efficiently handle local exchange traffic, all of which incur significant costs. Competitors like GCI cover these costs by first entering the market and winning customers through use of UNE loops.

GCI is making use of UNEs as Congress and the Commission intended, migrating such circuits to its own network as is most efficient. Whether GCI's network will ultimately be ubiquitous is a fact-finding effort the Commission will need to engage in to make a final determination on forbearance just as it did in the *Qwest Omaha Order*. On its face, however, the Petition does not provide any justification for forcing GCI into a quicker facilities deployment, or provide sufficient information on which the Commission can reasonably rely regarding whether GCI intends to deploy last-mile facilities to serve end users within portions of the Anchorage market where GCI currently does not provide service. A grant of forbearance without appropriate record evidence demonstrating that GCI will indeed provide an immediate facilities-based competitive alternative to ACS's network is premature.

E. ACS Fails to Provide Any Evidence that Substantial Intermodal Competition Exists in Anchorage.

As scant as is ACS's proof of retail and wholesale wireline competition, its factual evidence of the competitive impact of either wireless or VoIP providers in the relevant local exchange product markets is absolutely nonexistent. Indeed, of its 51 page Petition, ACS devoted approximately one page to the discussion of VoIP and wireless services as potential competitive alternatives in the local exchange markets. The Petition literally provides no factual evidence and quite frankly very little argument to support its claims of intermodal competition.

First, ACS provides no evidence whatsoever of any VoIP competition. It provides no data regarding how many competitors are offering VoIP services in Anchorage, no statistic regarding the number of VoIP lines or number of customers substituting VoIP for traditional voice grade lines, and no data on VoIP market share or penetration into each of the relevant product markets in the Anchorage study area. Indeed, ACS does not identify a single company or carrier that is offering VoIP in the Anchorage area. ACS, however, rather simply makes the general claim that "customers can obtain effective substitutes to ILEC service using . . . broadband-based VoIP services and other technologies."[44] ACS has provided no evidence to justify the veracity of this statement with respect to any wire center in Anchorage, and accordingly its claims regarding VoIP competition should be afforded no weight by the Commission.

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44 Petition at 16.

To the extent ACS was able to provide factual data regarding the scope of VoIP competition in Anchorage, however, it would nonetheless have to demonstrate that the underlying broadband services over which the VoIP functionality runs are also in fact competitive. Unless there is true competition among providers of the underlying broadband facilities over which the VoIP services run – another series of facts which ACS has failed to provide in its Petition – any claims of VoIP competition are meaningless. As the Commission is aware, VoIP is a software protocol that requires a physical broadband connection. Ultimately, the entity that controls the rate for the broadband pipe, controls the overall cost of the VoIP service. This holds true notwithstanding the fact that the VoIP service may be offered to the end-user by a third-party. The cost component of the VoIP software application becomes meaningless unless there is ample competition for the underlying broadband facility so the VoIP provider can negotiate a true market rate. Otherwise, the incumbent will continue to command monopoly rents even though it is not providing the voice services to the ultimate end user.

Thus, there are three showings ACS needs to make with respect to VoIP competition and the Commission's forbearance analysis: (1) that there actually exist *any* companies that provide VoIP retail and wholesale services in each of the relevant product markets in each wire center within Anchorage; (2) that such companies serve a sufficient number of lines within Anchorage such that VoIP services have a material impact on the sale of traditional switched local exchange access services; and (3) that there is sufficient competition among the underlying

broadband providers such that the availability of VoIP services acts as a true price constraining (and thus competitive) factor on traditional circuit switched local services product markets. The ACS Petition contains none of this information.

Second, and equally deficient, ACS provides absolutely no factual data regarding the impact of competition from the wireless market on local exchange access telephony in any of the relevant product markets. ACS identifies three wireless providers, one of which is its own wireless affiliate, without providing any data regarding wireless penetration in Anchorage, or more importantly, wireless substitution for local exchange services. Indeed, ACS admits that it is simply unable to provide any data regarding wireless substitution.[45] ACS hangs its argument on the general statement that "industry analysts project Wireless and VoIP competition to grow significantly in the coming years."[46] Such generalizations and estimations, however, are not nearly sufficient to sustain a finding by the Commission that forbearance is warranted. There needs to be sufficient factual data that demonstrates the true level of competition in each of the relevant geographic and product markets in the Anchorage study area. This is something that ACS has not provided.

Even if ACS were able to provide data that wireless services act to constrain prices for traditional local exchange services in the residential mass market – which it has not done – even a cursory review of market conditions in Anchorage demonstrates that wireless services are *not* alternatives in the case of a

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45 *Id.* at 16.

non-transitory price increase by a theoretical monopolist in the enterprise market, at least with respect to customers seeking services at DS-1 or greater levels. Wireless services and high capacity voice grade services simply have very different capabilities.

F. ACS Fails to Provide Any Evidence that Forbearance Will Promote Local Competition.

As is the case for intermodal competitive alternatives, ACS has provided no evidence that alternative existing regulations to Section 251(c)(3) would be effective in ensuring that Anchorage was truly open to competitive entry and operation by non-incumbent carriers. First, ACS goes out of its way to demonstrate that its Petition does not impact its obligations to continue to resell local exchange services under Section 251(c)(4).[47] Notwithstanding this claim, the Petition provides no evidence that resale is an actual viable entry strategy for new carriers or economically viable for mid to long term use. Indeed, the Petition demonstrates the opposite. According to ACS, only 5,000 of the approximately 180,000 access lines, or less than three percent, are served through resale of ACS services by carriers other than GCI.[48] Even including GCI, only 11,000 total access lines in the entire Anchorage study area are served using resale.[49] Without some other facilities-based means of operating within a market, resale is simply not a viable alternative for an operating carrier, and the ACS Petition bears that out. The wholesale discount

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46 *Id.* at 17.

47 *Id.*

48 *Id.* at 6 and 17.

49 *Id.* at 17.

afforded carriers under Section 251(c)(4) is not sufficient to support any material expansion by a potential competitor into the local markets, and certainly would not provide a "cap" on ACS's deregulated UNE rates, as suggested in the Petition.[50] What little data ACS has been able to provide in this regard highlights this conclusion. Moreover, and more fundamentally, the pro-competitive goals of the Act in promoting facilities-based competition simply are frustrated in an environment where resale providers are unable to reasonably and efficiently migrate their services to UNEs – yet this is exactly what ACS is asking the Commission to do.

ACS also argues that any competitive harm resulting from a UNE forbearance determination would be mitigated because ACS would continue to fulfill its interconnection and number portability obligations under Section 251(c).[51] ACS does not explain, however, just how its adherence to its interconnection and number portability obligations will foster competitive entry of new carriers. Indeed, both of these requirements assume a competitor has a network to interconnect, and has *access to the customer* so that a number can be ported. Indeed, access to the customer through UNEs is *the* critical piece of the analysis, and the very obligation from which ACS is seeking relief. Nothing in the Petition, however, demonstrates that, if the requested relief is granted, ACS: (1) will have any serious motivation to offer UNEs to competitive carriers at all, and (2) would offer such UNEs at a competitive price on an ongoing basis to facilitate market entry. Without the obligation to offer UNE loops at cost-based rates, ACS's remaining obligations to

50 *See id.* at 44.

interconnect and port numbers will have no material effect on promoting competition in Anchorage.

In this regard, ACS argues that, because GCI has gained market share in Anchorage, ACS has incentives to keep traffic on its network, even if just on a wholesale basis through a new UNE offering.[52] Here again, ACS does not offer facts to determine what kind of competitive pressure GCI actually puts on ACS, in which wire centers, and in what markets. In addition, even if GCI provided a true competitive alternative in certain geographic and product markets, ACS never explains exactly how forbearance will further competition among third-party carriers other than GCI. Indeed, ACS is clearly intent on raising its UNE prices, or it would not be seeking forbearance from the obligation to provide them at cost-based rates.

It also is important to note that GCI is building its network from its cable monopoly base. This is not the case for other new entrants who have to build their networks from scratch and, as already determined by Congress and the Commission, need cost-based UNEs for successful competitive entry. Unlike Omaha, there is no evidence in Anchorage of any real competitive presence beyond GCI, and thus there is the real risk that the market will be controlled by only two facilities-based competitors, which obviously is not a truly competitive market.[53]

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51 [cite]Petition at __.

52 *Id.* at 34.

53 *See e.g.* Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice to Subcommittee on Oversight and Investigations, United States House of Representatives, on Competition in the Cellular Telephone Service Industry 2 (Oct. 12, 1995) ("Economic

If ACS's request for forbearance is granted, the only constraint on any ACS service offering is the requirement to provide services on a "reasonable and nondiscriminatory" basis pursuant to Sections 201 and 202 of the Act. ACS argues that these provisions are sufficient to protect consumers and would be competitors from unfair business practices,[54] but these provisions were not intended and are insufficient to ensure the development of local competition. The Act instead adopted a new standard that Congress deemed necessary to facilitate a competitive environment, which was the availability of UNEs at *cost-based rates under Section 251*. As such, without significantly more factual information demonstrating that each wire center within the Anchorage study area is sufficiently competitive within each relevant product market to permit market forces to dictate the rate, "just and reasonable" will not be sufficient to enable new competitors to enter the Anchorage market through the purchase of UNEs.

Finally, there is also no evidence or even claim in the record that GCI has made, or will make, its network, or any part thereof, available to third-party carriers either on an unbundled or resale basis. The Petition actually leads us to the opposite conclusion, as ACS has claimed that it has been unable to gain access to GCI's network.[55] There is certainly nothing in the record that could lead the Commission to the conclusion that GCI has any incentive at all to open up its

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theory and experience teach us that markets with only two competitors and legal barriers preventing additional entry will result in only limited competition.").

54 Petition at 36.

55 *See* Petition at 10, 15.

network. Based on ACS's own claims, it is GCI that is taking market share from ACS, not the other way around. Without competitive pressure from third-party carriers on GCI's ability to compete, it in fact has absolutely no incentive to offer its network to competitors.

To thus claim as fact that there are no barriers to entry into the Anchorage market due to GCI's presence; that due to such presence there will be ample incentive for ACS to offer its network to other carriers; and to further imply that, due to the alleged ubiquity of GCI's network it too will be available to third-parties, is simply unsupportable and should thus be rejected by the Commission.

G. The Petition Does Not Support a Finding that the Forbearance Criteria Have Been Met.

The ACS Petition does not provide sufficient information for the Commission to make a supportable determination that forbearance from the obligations of Section 251(c)(3) is appropriate. First, the Commission cannot determine from the Petition whether ACS's "charges, practices, classifications, or regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory." As the Commission stated in the *Qwest Omaha Order*, "competition is the most effective mans of ensuring that. . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[56] ACS has failed to properly define either the relevant product or geographic market, or more importantly, provide any factual support that robust facilities-based, or intermodal, competition exists in each such product and

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56 *Qwest Omaha Order* at ¶ 63.

geographic market, effectively stripping from the Commission any ability to reasonably justify a grant of forbearance.

As for the second prong of the forbearance test, there again has been no showing that consumers will be protected in the event that the requested forbearance is granted. Indeed, the record demonstrates that the opposite is true. First, without wire center-specific data regarding where GCI is currently using its own facilities, the Commission cannot determine which customers currently have facilities-based competitive alternatives to ACS. The record currently demonstrates, however, that GCI relies on its own facilities for only approximately 18 percent of all access lines. Thus, 82 percent of all customer access lines would not have a facilities-based alternative if the Commission were to forbear from enforcing the Section 251(c)(3) obligations against ACS, and approximately 70 percent of all GCI customers would be required to return to the ILEC, which by ACS's own admission, would increase most consumers phone bills.[57] Second, if GCI were forced to deploy facilities before it is operationally ready to do so, service to customers could be jeopardized, and any additional costs incurred by GCI in such an effort would likely be passed on to consumers. Finally, without the ability of GCI to quickly migrate all of its UNE customers to its own facilities, ACS would significantly increase its market power, again potentially resulting in increased rates to consumers, hindering, rather than fostering competition and consumer welfare. Even considering the most favorable outcome of a forbearance

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[57] Petition at 14.

determination, consumers likely would face an effective duopoly, and as discussed more fully above, run the risk of collusive or other anticompetitive behaviors. Clearly, the Commission cannot make a determination that consumers will not be harmed by forbearance from Section 251(c)(3) in the instant case.

Finally, a grant of forbearance at this point would not be in the public interest. Section 10(b) emphasizes that the Commission should determine whether forbearance will "promote market competition," and that such a determination can be used to satisfy the public interest test.[58] Again, despite ACS's claims that forbearance will actually improve competition in the local exchange market because it will encourage GCI to more quickly invest in its own facilities, the converse is true. First and foremost, GCI does not need additional incentive to build out its network. According to ACS, GCI already plans to migrate all of its customers to its own network within 18 months. To use this point on the one hand to argue that GCI's facilities are ubiquitous and that GCI has the ability to migrate customers to its network quickly, and then on the other hand claim that GCI needs additional incentive to build out its own network through a forbearance determination is simply disingenuous. Both points cannot be right. Either GCI is building out its network quickly, in which case, forbearance will have no material effect on GCI or its ability to compete with ACS, or it is slow rolling its network build and thus not able to serve the entire Anchorage market, in which case forbearance may force it to prematurely invest in the deployment of its facilities more quickly than it had

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[58] 47 U.S.C. § 160(b).

originally intended based on its own business planning. Either way, ACS's arguments are undermined. The fact is that ACS represents that GCI is planning a migration of all its customers within two years – a plan, which, if accurate, is clearly consistent with the intent of the Act – and a forbearance determination at this time will not likely materially accelerate GCI's customer transition, but rather could serve to undermine GCI's efforts, thereby putting customers at risk.

Also, notwithstanding any arguments ACS has made regarding GCI's facilities deployment, its Petition is devoid of any material discussion of other existing competitors, or equally important, the impact that forbearance could have on "potential" or "new" market entrants. Indeed, ACS fails to address the new market entrant wishing to compete, and simply relies on the supposition that having a single facilities-based competitor is sufficient for a finding that the market is competitive enough to eliminate all unbundling obligations. ACS's Petition conveniently omits any discussion of the potential anti-competitive conduct that can result from a duopoly of facilities-based providers, which is the most likely result of forbearance under the instant set of facts. Except in limited circumstances, total service resale is uneconomical, as is entry through use of loops not at cost-based rates. Similarly, entry into a market exclusively over a competitive carrier's own facilities is uneconomical, and frankly unrealistic. If forbearance is granted, no prospective, reasonably efficient competitor enter the Anchorage market, leaving Anchorage with the ILEC and one facilities-based competitor currently serving only 18 percent of all access lines exclusively over its own facilities or through

multiplexed ACS loops. Under no scenario represented by ACS is there adequate justification for permitting ACS to forgo its unbundling obligations to other carriers. This is especially relevant in light of ACS's statement that it has been unable to enter into any arrangement with GCI permitting ACS access to GCI facilities.[59]

III. THE *QWEST OMAHA ORDER* DOES NOT BIND THE COMMISSION IN THIS PROCEEDING.

ACS cannot invoke, and the Commission should not rely upon, the *Qwest Omaha Order* as precedent supporting the Petition. Beyond several potential legal infirmities that will be considered by the courts, the *Qwest Omaha Order* was limited to its facts as, by the Commission's own terms, a "unique," factual predicate.[60] The *Qwest Omaha Order* states explicitly that that the Commission's decision to grant forbearance relief applies only to Omaha, rendering both the outcome and the rationale of the *Qwest Omaha Order* inapposite to the ACS Petition.

The Commission makes clear in the *Qwest Omaha Order* that ILECs should not rely upon or invoke that decision in subsequent forbearance requests. Its analysis is peppered with admonitions that the order rests on "factors unique to the Omaha MSA,"[61] indicating the Commission's intent that the *Qwest Omaha Order* not become precedent for future proceedings, such as the instant proceeding. In a word, the *Qwest Omaha Order* is limited to its facts, and cannot serve as a benchmark for the competitive analysis that the ACS Petition requires.

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59 *See* Petition at 10, 15.

60 *Qwest Omaha Order* n.4 and n.46; *see also id.* at ¶ 14.

In federal jurisprudence, a decision that focuses narrowly and absolutely on a case's particular factual predicate will be limited to its facts, precluding its use as supportive precedent for subsequent decisions. As the Supreme Court explained this principle long ago, this result occurs where "the principle on which the decision proceeded is not broader than the situation to which it was applied."[62] The Court subsequently has limited its decisions that are especially fact-intensive from being applied to subsequent cases.[63] Reliance on a case that is or must be limited to its facts is improper.[64]

The *Qwest Omaha Order* likewise cannot act as *stare decisis* for the ACS Petition. Its result depended on "factors unique to the Omaha MSA," such as the level of Cox's cable plant deployment.[65] Indeed, that order includes the cautionary note:

> We emphasize, however, that in undertaking this analysis, **we do not issue any declaratory rulings,**

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61 *Qwest Omaha Order* at n.4.

62 *Salinger v. United States*, 272 U.S. 542, 549 (1926).

63 *Hudson v. Palmer*, 468 U.S. 517, 533 1984) (limiting *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)) (negligent destruction of inmate's property by state employee does not violate Due Process Clause); *Wainwright v. Sykes*, 433 U.S. 72, 87-88, (1977) (limiting *Fay v. Noia*, 372 U.S. 391 (1963)); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534 (1946) (limiting *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 284 U.S. 248 (1932)).

64 *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); *Florida Power & Light Co. v. United States*, 375 F.3d 1119, 1125 (Fed. Cir. 2004) (refusing to rely on Court of Claims decision that "was effectively limited to its facts"); *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1242 (11th Cir. 1999) (district court erred in relying on a case "limited by its facts"); *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 796 n.178 (D.C. Cir. 1985); *Hudson River Fishermen's Ass'n v. Federal Power Comm'n*, 498 F.2d 827, 832 (2d Cir. 1974) (noting limitation of *Atchison*).

65 *Qwest Omaha Order* at n.4.

> **promulgate any new rules, or otherwise make any general determinations** of the sort we would properly make in a rulemaking proceeding on a fuller record.[66]
>
> The Commission went on to state that:
>
> **We stress that our decision today is based on the totality of the record evidence particular to the Omaha MSA.** The presence of a subset of similar facts in other markets – such as an equivalent degree of coverage by an incumbent cable operator that was not actively engaged in providing competitive telecommunications offerings over its own facilities – **might result in a different outcome**.[67]

The Commission could hardly have been clearer in conveying its intent to limit its grant of forbearance in Omaha to the factual presentation before it, and that subsequent forbearance requests should not invoke the *Qwest Omaha* result as dispositive, or even persuasive, precedent.

Due to the inconsistencies in the Commission's legal analysis, and the express factual limitations, the *Qwest Omaha Order* is inapposite to the ACS Petition. Moreover, as demonstrated herein, the record is clearly devoid of sufficient information necessary for the Commission to make any forbearance determination with respect to ACS. For all these reasons, the Commission should exclude the *Qwest Omaha Order* from its analysis when reviewing the ACS Petition.

IV. CONCLUSION

For the reasons set forth herein, the Commission should reject the Petition of ACS, and should not forbear from applying Sections 251(c)(3) of the Act, and the

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66 *Id.* at ¶ 14.

67 *Id.* at n. 46 (emphasis added).

related pricing standards for UNEs set forth in Section 252(d)(1), within the Anchorage study area.

/s/ Thomas W. Cohen

Brad E. Mutschelknaus
Thomas W. Cohen
Jason Karp
Stephanie A. Joyce
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)

Counsel to Covad Communications Group, Inc..

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